No. 90-952

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANICE G. CLARK, *et al.*,
Appellants,

v.

CHARLES "BUDDY" ROEMER, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Louisiana

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REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

INTRODUCTION

Throughout the brief of the appellees runs a continuing diatribe against the reasoning of the Attorney General's Section 5 objections in this case. Long-settled principles, however, demonstrate that the court below, and this Court on appeal, have no jurisdiction to review the substance of the Attorney General's Section 5 decision. *Allen v. State Board of Elections*, 393 U.S. 544, 559, 570 (1969); *Perkins v. Matthews*, 400 U.S. 379, 385 (1971); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645-646 (1977); *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983); *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984). As for the appellees' incessant criticism of the Attorney General, suffice it to say at this point that racial discrimination is a serious problem in the election of state court judges in many parts of Louisiana, and the Attorney General's well-documented objection letters show that he did the job

Congress assigned to him when he objected to uncleared at-large elected judgeships in some of the state's judicial districts. (J.S. App. 108a, 127a, 142a). *See also, Clark v. Edwards*, 725 F.Supp. 285 (M.D. La. 1988) (decision of the single-judge district court in the Section 2 case outlining extensive racial discrimination in judicial elections in Louisiana).

Section I of this reply brief will respond to part II of the appellees' brief, which challenges the overall validity of the Attorney General's objections and relies upon grounds different from those relied upon by the district court. The remainder of this reply brief will then address the other issues in the order originally presented in the Brief for Appellants.

I. BY FAILING TO CROSS-APPEAL, APPELLEES HAVE WAIVED ANY CHALLENGE TO THE OVERALL VALIDITY OF THE ATTORNEY GENERAL'S OBJECTIONS, AND EVEN IF THE CHALLENGE IS NOT WAIVED, THE ATTORNEY GENERAL'S OBJECTIONS ARE NOT REVIEWABLE IN THIS CASE.

Part II of the appellees' brief is, for the most part, a criticism of the Attorney General's substantive decision to interpose objections. In particular, the brief claims the Attorney General employed an improper rationale by objecting to what the appellees call the "system" of electing the new judges when most of the changes that triggered his review were the addition of new judgeships to a pre-existing "system." (Brief for Appellees at 28, 30-31). In addition, appellees assert that the Attorney General failed to withdraw his objections after the Fifth Circuit's September 28, 1990 holding that Section 2 is inapplicable to judicial elections, *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), *cert. granted*, 112 L.Ed.2d 838 (1991), and thereby contravened his own regulation stating he will be guided by relevant

court decisions. (Br. for Appellees at 32-33).[1] Accordingly, the appellees seem to contend the Attorney General's objections were invalid, and although appellees do not come out and say it, they apparently want this Court to set aside the objections. (*Id.* at 34a-35a).[2]

As an initial matter, it appears appellees have waived these issues by failing to cross-appeal. In the absence of

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[1] Appellees also insist that the Attorney General's objections did not follow *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986), and the single-judge district court's June 12, 1990 opinion in the remedy phase of the Section 2 portion of the present case because the objections were not "district-specific" and instead went to Louisiana's entire "system" of trial and appellate court elections. (Br. for Appellees at 32-33). That is simply wrong. The Attorney General's objections have not gone to the entire "system" in every judicial district in the state, but instead to at-large elected judgeships in specific districts where the evidence demonstrates discrimination in the election of those judgeships. As for other districts where the Attorney General concluded there was no discrimination, the at-large judgeships have been precleared. (See, e.g., J.S. App. 129a, 139a-140a, 184a-186a).

[2] There appears to be no claim by the appellees that these new judgeships were not voting *changes* subject to Section 5 review. To the contrary, appellees seem to concede they were changes.

> Rather than examining the proposed *changes*, the Department refused preclearance because of the existence of Louisiana's "at-large system with designated posts and a majority vote requirement." J.S. App. 132a. That "system," however, was not changed in any way by the submitted act.

(Br. for Appellees at 28, emphasis added). Indeed, this Court's precedents demonstrate that the addition of judgeships within existing election districts constitutes a change under Section 5. *See, Brooks v. State Board of Elections*, No. CV 288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court), *aff'd mem.*, 111 S.Ct. 288 (1990); *Haith v. Martin*, 618 F. Supp. 410, 411-413 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986); *City of Lockhart v. United States*, 460 U.S. at 131 (the addition of new seats on a city governing body is a voting change that must be precleared); *Allen v. State Board of Elections*, 393 U.S. at 566-567 (Congress intended Section 5 "to reach *any* state enactment which alters the election law of a covered state in *even a minor way*" and intended "to give the Act the broadest possible scope.")

a cross-appeal or cross-petition, this Court has said an appellee or respondent may raise an alternate ground for defending the judgment below only if "affirmance on the alternate ground would neither expand nor contract the rights of either party established by the judgment below." *Granfinanciera, S.A. v. Nordberg*, 106 L.Ed.2d 26, 38-39 (1989).[3] Here, the appellees' claim that the Attorney General's objections were invalid would, if successful, lead to a wholesale cancellation of practically all of the Attorney General's objections and the denial of all relief to the appellants. Although the appellants contend they did not receive sufficient relief in the district court, they did receive some relief. Elections were enjoined by the district court for three seats, (J.S. App. 77a-78a), and the appellees are enjoined from permitting the winners of certain other elections to serve over 150 days after any final denial of preclearance in the District of Columbia litigation. (*Id.* at 76a). However, if appellees were successful on these issues and thereby invalidated the Attorney General's objections, the district court would be required to dismantle what little relief it has given. This would, in the words of the *Granfinanciera* case, "expand [and] contract the rights . . . established by the judgment below," and is therefore not a ground for affirming the judgment below. "An argument that would modify the judgment . . . cannot be presented unless a cross-petition has been filed." *Trans World Airlines v. Thurston*, 469 U.S. 111, 119 n.14 (1985). Given

[3] *Granfinanciera* dealt with a petition for writ of certiorari and the failure to cross-petition, but the reasoning would also appear to be applicable to appeals. Rule 18.6 of the Rules of this Court, dealing with appeals, states that "[t]he Court may permit the appellee to defend a judgment on any ground . . . that would not expand the relief granted."

that the appellees did not cross-appeal, the issues are waived.[4]

Turning to the merits of these issues, the appellees challenge the reasoning of the Attorney General's objections, claiming it is improper because it focused not on the addition of new judgeships but instead on the incorporation of pre-existing election mechanisms used in the election of those new judges. They also contend the reasoning was flawed because the Attorney General did not withdraw his objection after the Fifth Circuit's decision in *LULAC*. However, as this Court has stated time and again, a review of the Attorney General's substantive reasoning is not within the ambit of Section 5 enforcement actions brought in federal court in the covered jurisdictions. *Allen v. State Board of Elections*, 393 U.S. at 559, 570; *Perkins v. Matthews*, 400 U.S. at 385; *United States v. Board of Supervisors of Warren County*, 429 U.S. at 645-646; *City of Lockhart v. United States*, 460 U.S. at 129 n.3; *McCain v. Lybrand*, 465 U.S. at 250 n.17.[5] It would greatly complicate the long-established

[4] The failure to cross-appeal also would waive any claim that the addition of the judgeships was not a voting change covered by Section 5. (See footnote 3 of this brief).

Even if these alternative grounds could sustain the judgment below, they were not raised or identified as grounds for sustaining the judgment in the Motion to Dismiss or Affirm filed by the appellees. *See, Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816 (1985). One commentator has said:

> Since the motion to dismiss or affirm serves the same basic function as a brief in opposition, an appellee should present in the motion to dismiss or affirm all available arguments as to why the appeal should be dismissed or the judgment affirmed.

13 Moore's Federal Practice Para. 818.30[1].

[5] In Section 5 enforcement actions such as this, the only questions at issue are "(1) whether a change is covered by Section 5, (2) if the change is covered, whether Section 5's approval requirements have been satisfied, and (3) if the requirements have not been satisfied, what relief is appropriate." *McCain v. Lybrand*, 465 U.S. at 250 n.17.

scheme of Section 5 enforcement for the federal courts in the covered jurisdictions to examine the reasoning of each of the Attorney General's objections to determine their propriety. It also would violate the intent of Congress, which designated the federal district court for the District of Columbia as the only court to make substantive decisions about the appropriateness of preclearance, with direct appeal to this Court.

Moreover, even if the Attorney General's reasoning were an issue in this case, it is abundantly clear that the Attorney General's review can and should consider pre-existing election features that are carried forward as part of a voting change. This Court in *City of Lockhart v. United States*, a Section 5 declaratory judgment action filed in federal district court in the District of Columbia, said that a voting change adding new seats to a city governing body must be examined in light of the pre-existing election features. "The possible discriminatory purpose or effect of the new seats, admittedly subject to Section 5, *cannot be determined in isolation from the "pre-existing" elements of the council.*" 460 U.S. at 131 (emphasis added).

With respect to *LULAC*, nothing required the Attorney General to withdraw his objection after the *LULAC* decision. Even if *LULAC* were correct—a proposition disputed by the appellants and the Attorney General—it deals only with Section 2 and not Section 5. To the extent the Attorney General's objections rested in part upon Section 2's prohibitions, nothing requires the Attorney General to follow every federal court decision from around the country regarding the interpretation of Section 2, particularly when the decisions are conflicting. His internal regulations state that he will be "guided by the relevant decisions" of this Court and other federal courts. 28 C.F.R. 51.56. However, that does not mandate that he, for instance, apply one rule in the Fifth Circuit because of the *LULAC* decision and apply another

in the Eleventh Circuit, which is not shackled by *LULAC*. While he will look for guidance in relevant court decisions, he ultimately makes his own decision in light of what he perceives to be the relevant facts and law, as does the federal district court for the District of Columbia when it decides a preclearance request.

The appellees conclude part II of their brief by stating that the "Justice Department is attempting to make Louisiana change to a system of electing judges by subdistricts or by limited or cumulative voting," (Br. for Appellees at 37), and then by launching into an inaccurate discourse about what the appellees perceive to be the drawbacks of each of these methods of election. (*Id.* at 37-41).[6] First of all, the pros and cons of potential remedies have little relevance in this case, where the merits of the Attorney General's objections are not under review. Moreover, the Attorney General is not trying to "make" Louisiana do anything except comply with Sec-

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[6] Among the many inaccuracies are the statement that multimember subdistrict lines must constantly be redrawn as new judges are added because "the population per judge across the subdistricts within the district will no longer be approximately equal." (Br. for Appellees at 38 n.32). Because the one person-one vote rule does not apply to judges, it is quite easy to add each new judge to an existing subdistrict in a rotating order.

Also, the appellees profess concern about small subdistricts leading to "'neighborhood judges' who are influenced by their constituency and the source of their campaign funds," and who will indulge in "home-town cooking." (Br. for Appellees at 38). What they fail to mention is that Louisiana already has some very small single-member judicial election districts, several under 20,000 population and some right around 10,000. (See Attachment A to document #188 in the record). Those districts are majority white and no one seems too concerned about corrupt "neighborhood judges." But once the possibility of majority black districts—all of which would be larger than these existing single-member districts—comes into play, the State officials suddenly become very concerned about the possibility of corruption. Their perspective is distorted and their newfound concern with small election districts is inconsistent with existing state policy.

tion 5 by adding new elected judgeships in a manner that does not discriminate. The choice of the method belongs to the State. Finally, while the appellees insist that "[t]he time-honored system of electing judges in Louisiana . . . is . . . workable and desirable," (*id.* at 41), they ignore the fact that the Attorney General has concluded the addition of new at-large elected judgeships in some of the districts perpetuates illegal racial discrimination. Given that the "time-honored system" has so thoroughly excluded black people in some parts of Louisiana, Section 5 requires that its discriminatory elements not be continually replicated in new voting changes.

II. CONTRARY TO THE APPELLEES' CONTENTION, *McCAIN v. LYBRAND* CONTROLS THIS CASE AND DEMONSTRATES THAT THE VOTING CHANGES TO WHICH THE ATTORNEY GENERAL OBJECTED HAVE NOT BEEN RETROACTIVELY CLEARED BY THE PRECLEARANCE OF OTHER VOTING CHANGES.

As noted in the appellants' initial brief, *McCain v. Lybrand* holds that the later preclearance of voting changes does *not* clear earlier unsubmitted changes, even in the same election district. According to appellees, however, *McCain* is "easily distinguishable" from the present case because the earlier uncleared change in *McCain* was "dramatic" and "created a completely new method of electing the county government," while here "almost all of the [prior] unprecleared acts merely provided for an additional judgeship in various districts." (Br. for Appellees at 11, 13-14, footnote omitted).

Contrary to appellees' analysis, nothing in *McCain* suggests that its reasoning goes only to those prior uncleared changes that are "dramatic" or create "a completely new method" of election. Instead, *McCain* holds that the submission and preclearance of a voting change does not constitute a submission or preclearance "of changes made by previous legislation which themselves were independently subject to Section 5 preclearance." 465 U.S. at 256. Thus, by its own terms, *McCain*'s reasoning applies to *any* prior uncleared change independently subject to the preclearance requirement, whether a major or minor change.

Moreover, it would be totally out of keeping with the statutory language and construction of Section 5 to suggest that major or "dramatic" changes could not be retroactively cleared, while minor or "undramatic" changes could be. The language of Section 5 does not distinguish between major and minor changes, and this Court as early as *Allen v. Board of Elections* made it clear that Congress intended Section 5 to be fully applicable to changes "which alter[] the election law of a covered state in even a minor way." 393 U.S. at 566. Imposing a distinction between major and minor changes upon Section 5 jurisprudence would put the federal courts of the covered jurisdictions in the tricky business of determining which changes are major and which are minor—a business for which no statutory guidelines exist. That would exceed the limited role carved out for those courts in Section 5 enforcement proceedings, *see*, *United States v. Board of Supervisors of Warren County*, 429 U.S. at 645-646, and would be inconsistent with efficient enforcement of the Act. In passing Section 5, Congress required independent review of *all* voting changes, major or minor, dramatic or not.

The remainder of the appellees' discussion of this general issue goes only to the reasoning of the Attorney General's objections, accusing the Attorney General of "inconsistencies" and "anomalies." (Br. for Appellees at 16-17). As stated earlier, such criticisms of the Attorney General's decisions are not relevant in this proceeding.[7]

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[7] To the extent there were "inconsistencies" between the Attorney General's earlier preclearances and his later objections, those "inconsistencies" do not invalidate the objections. Moreover, there

Most of the situations in which the district court held voting changes to have been retroactively cleared involved the preclearance of later at-large judgeships that the district court said automatically cleared earlier at-large judgeships in the same election district. Four exceptions to this general pattern exist. (Br. for Appellants at 7-10, 22-24). As stated at page 24 of appellants' initial brief, this Court can reverse the district court because of the district court's general rule on this point without sorting out the details of these four situations. Meanwhile, the appelees' discussion of these matters (Br. for Appellees at 21-25) requires brief responses to only three points.

First, appellees are wrong when they say the issue surrounding the First Circuit Court of Appeals involves "the division of the First Circuit into districts." (Br. for Appellees at 21). Instead, it involves the creation of designated divisions, which are the equivalent of numbered posts, in the First Circuit. (Br. for Appellants at 7-8, 22-23). Second, with respect to the split of the 10th and the 39th judicial districts, the appellees attempt to distinguish *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110 (1978). (Br. for Appellees at 23-24). However, the distinctions they list in no way undermine the relevance of *Sheffield*, which was based in large part on the conclusion that "the Attorney General did not intend to approve the proposed change" that was the subject of the referendum, even though he approved the referendum itself. 435 U.S. at 137. Here, the preclearance clearly went only to "the special election" for

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appears to be a quite logical explanation. The Attorney General began interposing objections to uncleared at-large judgeships in some judicial districts in Louisiana when he was confronted with evidence of extensive racial discrimination in the at-large election of judges in those districts. (J.S. App. 108a, 127a, 142a). The fact that he did not object to some of the judgeships in earlier years in no way required him to close his eyes to the evidence of discrimination once it came to his attention.

the referendum. There is absolutely no indication the Attorney General intended to preclear the split, and there is no proof the split itself was called to his attention in the State's submission. (J.A. 101-102). Third, the appellees' assertion that the Attorney General approved an additional judgeship in the 20th Judicial District is unaccompanied by any citation to the record. (Br. for Appellees at 24). Contrary to the appellees' representations, the Attorney General never precleared an additional judgship for the 20th district. (See Br. for Appellants at 9-10, 23-24, and record citations therein).

III. THE CHALLENGE TO THE DISTRICT COURT'S RULING PERMITTING ELECTIONS TO GO FORWARD AND PERMITTING THE WINNERS TO HOLD OFFICE PROVISIONALLY IS NOT MOOT, AND THE DISTRICT COURT'S RULING WAS IN ERROR.

Appellants have challenged the district court's ruling that elections could go forward and winners can hold office provisionally even for judgeships the district court conceded had never been cleared. Appellees contend this question is moot. At the outset, they are incorrect when they imply the issue is limited to the propriety of holding the November 6 and December 8 elections that this Court enjoined. (Br. for Appellees at 41). The district court also permitted the October 6 elections to go forward even though it initially enjoined the winners from taking office. Eventually, however, it lifted that injunction and permitted those who won the October 6 election without the need for a November 6 runoff, and those who never had opposition, to take office and serve provisionally throughout the course of any Section 5 litigation instigated by state officials in federal district court in the District of Columbia. This Court's injunction did not prohibit those people from taking office. Thus, as a result of the district court's errors, the October 6 elections were held and people took office in many of the judgeships to

which the Attorney General objected. The matter is not moot.

There are other reasons why it is not moot. For instance, affirmance of the district court would permit that court to reschedule the elections this Court enjoined. In addition, if this Court were to reverse the district court's holding that various judgeships were cleared retroactively, the future status of those judgeships will be related to whether this Court affirms or reverses the district court's order permitting winners to serve provisionally in uncleared judgeships. Finally, whether the district court erred on this point is of future consequence inasmuch as the district court may be faced with the issue again if new judgeships are created in Louisiana to which the Attorney General objects.

As for the merits, the appellees point first to the district court's statement that "the request for an injunction of the unprecleared judicial positions came very close to the October 6 election day." (J.S. App. 33a-34a) (Br. for Appellees at 42). However, the district court did not consider this a waiver of the plaintiffs' claims, and did not deny the injunction because of the timing of the motion, inasmuch as the district court prefaced the above-quoted statement by saying "the Court does not intend to place the blame on any one party." (J.S. App. 33a-34a). Had the Court concluded the plaintiffs delayed to such an extent that the motion should be denied, surely it would have, in some sense, placed the blame upon them. Moreover, the plaintiffs first raised these issues nearly four years ago, in the 1987 amended complaint. Shortly after they learned the State was going to hold the elections in the fall of 1990, illegally and in defiance of the Attorney General's objections, the plaintiffs filed a motion for injunction in July of 1990, well before the initial October election date. The motion was not untimely. (See Br. for Appellants at 28-29; Br. for the U.S. as Amicus Curiae at 15).

Next, the appellees contend, "at the time of the hearing, this Court had not issued its summary affirmance in *Brooks v. Georgia State Board of Elections*, which case posed for the first time whether Section 5 applied to the mere addition of judgeships." (Br. for Appellees at 42, citation omitted). While the first hearing in this case was held prior to the October 15, 1990 summary affirmance in *Brooks*, the district court scheduled another hearing on October 18, at which time the *Brooks* affirmance was discussed in detail. Thus, the district court was aware of *Brooks* when it issued its October 22 order permitting the remaining elections to go forward and permitting winners to take office. Moreover, *Brooks* did not pose this issue for the first time. Over four years earlier, this Court summarily affirmed a district court decision applying Section 5 to the addition of judgeships in pre-existing districts. *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986). *See also, Kirksey v. Allain*, 635 F. Supp. 347 (S.D. Miss. 1986) (three-judge court) (holding Section 5 applicable to the addition of uncleared judgeships).

Finally, the cases cited by the appellees on this point (Br. for appellees at 43-44) have previously been discussed in the briefs of appellants (pages 29-30) and the United States (pages 16-19).

IV. CONTRARY TO APPELLEES' SUGGESTION THAT NO RELIEF BE AFFORDED, THIS COURT SHOULD ORDER THE ELECTIONS SET ASIDE AND REMAND THE MATTER TO THE DISTRICT COURT WITH INSTRUCTIONS THAT THE UNCLEARED JUDGESHIPS MAY NOT BE ALLOWED TO OPERATE PAST JANUARY 1, 1992.

In the event this Court holds that the district court erred in permitting the elections to go forward and the winners to take office, the question of relief will arise. The appellants have asked this Court to order the illegal

elections set aside in keeping with *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 182-183 (1985). In addition, the appellants have requested the case be remanded to the district court with instructions that the uncleared judgeships may not continue in operation past January 1, 1992 absent the holding of new elections that cure the Section 5 deficiencies found by the Attorney General. Alternatively, the appellants have asked this Court to set some other time limit or, at the very least, to require the district court to set its own time limit. (Br. for Appellants at 31-35).

By contrast, the appellees contend that even if this Court finds that the elections were held in error, absolutely nothing should be done and the illegal elections should be allowed to stand. (Br. for Appellees at 44, 50). The appellees' brief makes a number of assertions attempting to support this view.

First, the appellees note that when the three-judge court initially said the October 6 election could go forward, no immediate effort was made by the appellants to seek from this Court an injunction against the election. (Br. for Appellees at 44, 48). However, the September 28 order permitting the October 6 election specifically enjoined the winners from taking office pending final resolution of the issue by the district court, leaving open the distinct possibility that the election results would not be implemented. (J.S. App. 90a-91a). It would have been premature to seek extraordinary relief from this Court when the district court had yet to decide what to do. Once the district court decided to let the winners take office, appellants sought an injunction from this Court. Moreover, this Court never has required that an application for a stay or injunction be filed in order to preserve the right to seek the setting aside of illegal elections once the merits of the case are adjudicated. *See, NAACP v. Hampton County Election Commission*, 470 U.S. at 173, 182-183 (no pre-election stay or injunction was

sought from this Court, yet the Court ordered that the election be set aside if the Attorney General objected to the change).

The next contention from the appellees' brief is that "appellants have made no attempt in the three-judge court to unseat these judges." (Br. for Appellees at 44). Of course, the appellants attempted in the district court to keep the judges from taking their seats in the first place. Once the district court said the judges could hold the seats provisionally, there was nothing further for the appellants to do other than appeal to this Court. Thus, no bypass of available remedial alternatives occurred in the district court.[8]

The appellees cite this Court's statement in *Hathorn v. Lovorn*, 457 U.S. 255, 270 (1982), that the district courts often are in a better position than this Court to fashion relief. (Br. for appellees at 45-46). While that may be true as a general matter, this Court has not hesitated to give specific remedial instructions to the district courts in Section 5 cases where appropriate. Indeed, in *Hampton County*, this Court's most recent Section 5 case, the Court specifically instructed the district court to give the jurisdiction no more than 30 days to seek preclearance from the Attorney General and ordered the district court to set aside the elections if the Attorney General's approval is not forthcoming. Here, since the Attorney General's

[8] At pages 44-45, n. 41 of their brief, the appellees quote counsel for the appellants at a December 20, 1990 hearing before the single-judge court, Chief Judge John V. Parker. The hearing was called to consider the status of the pending constitutional claims before Judge Parker, and during the course of the hearing he asked about the status of the issues before the three-judge court. Appellants' counsel, in the quoted statement, simply told Judge Parker of the appellants' view that this Court's November 2, 1990 injunction did not specifically prohibit candidates elected on October 6 or candidates without opposition from taking office in the uncleared judgeships. The statement was not a waiver of the right to seek to have the elections set aside if the appellants prevail on appeal.

approval already has been denied, this Court can and should, at the very least, order the elections set aside in keeping with *Hampton County*.

Moreover, the district court already has indicated its chosen remedial path, saying it intends to keep the uncleared judgeships open until at least 150 days after the conclusion of the District of Columbia litigation, including the judgeships for which the November 6 elections were enjoined by this Court and which are now filled by incumbents or appointees. (See the January 11, 1991 order of the district court, J.A. 268). This open-ended continuation of the Section 5 violations is improper (see Br. for Appellants at 32-35), and this Court should impose a time limit rather than leaving to the district court a matter it already has decided.[9]

In their brief, the appellees quote *Perkins v. Matthews*, 400 U.S. at 396-397, to the effect that "[i]n certain circumstances . . . it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming." (Quoted in Br. for Appellees at 46). Here, of course, local officials have had an opportunity to seek federal approval, did so over three years ago, and the approval was denied. Even though the initial denial occurred nearly three years ago, the state defendants did not file a preclearance action in federal district court in the District of Columbia until three months ago, and then only under deadline from the federal district court in Louisiana. Thus, ample opportunity to seek federal ap-

[9] Even if the elections are set aside, permitting pre-election incumbents to hold office in the judgeships pending the resolution of the District of Columbia litigation will perpetuate the discrimination found by the Attorney General when he made his Section 5 objections. All of those incumbents were previously elected in uncleared election contests held pursuant to the same discriminatory at-large elections to which the Attorney General objected.

proval has existed, the required federal approval has not been forthcoming, and under *Perkins*, the elections should be set aside.

In both *Perkins* and in *Allen v. State Board of Elections*, cited by the appellees (Br. for Appellees at 46), local officials had yet to seek preclearance because of a dispute regarding the coverage of Section 5. In *Berry v. Doles*, 438 U.S. 190 (1978), also cited by the appellees (Br. for Appellees at 46-47), local officials had yet to seek preclearance and contended that the disputed 1976 elections at issue in that case had not been conducted pursuant to a voting change. 438 U.S. at 192. Those cases are far different from the present case, where preclearance was sought and the Attorney General objected some time ago.

Moreover, while this Court in *Berry* permitted the local jurisdiction to seek preclearance prior to the setting aside of any elections, the Court indicated that the preclearance would have to be sought and acted upon within a few months so the plaintiffs could obtain relief quickly. The *Berry* opinion was issued June 26, 1978, with the Court noting that the plaintiffs could, upon any denial of preclearance, seek relief with respect to the 1978 general election that would cure the defect from the disputed 1976 election. 438 U.S. at 193. That necessarily contemplated and required prompt action on the preclearance request in time for the fall, 1978 general election. By contrast, the appellees in the present case ask this Court to adopt the district court's timetable of waiting years for the litigation to conclude in federal court in the District of Columbia before any remedial action is taken. That is totally inconsistent with what the Court suggested in *Berry*.

In *Georgia v. United States*, 411 U.S. 526 (1973) cited by the appellees, (Br. for Appellees at 48), there was a serious dispute about Section 5's applicability and about

whether an objection had been timely interposed. 411 U.S. at 531. This Court, therefore, issued a stay permitting elections to go forward and then later, after ruling on the merits, declined to set the elections aside. By contrast, in the present case, Section 5 clearly is applicable and there is no claim that the Attorney General's response to the state's Section 5 submissions after this litigation started was untimely. The district court had no excuse for permitting the elections to go forward. Indeed, this Court did the exact opposite by enjoining the November 6 and December 8 elections for judgeships the district court conceded were uncleared. *Georgia v. United States* is not controlling.[10]

Next, the appellees argue the elections should not be set aside because, according to them, the law was unclear and with this Court's decision in *Brooks*, "a federal court held for the first time that the addition of judgeships was covered by Section 5." (Br. for appellees at 49). As mentioned earlier in this brief at page 14, that contention is incorrect. Moreover, any lack of clarity in the law is taken into account only as a justification for a jurisdiction's *failure to submit for clearance* voting changes about which there was some dispute as to Section 5's coverage. *Allen v. State Board of Elections*, 393 U.S. at 572; *Perkins v. Matthews*, 400 U.S. at 396. Here, the State of Louisiana submitted for clearance over three years ago most of the voting changes at issue. The state cannot now claim the elections should remain in place on the ground that it never sought clearance due to confusion in the law.

Finally, appellees contend no special elections can be held even if a time limit is imposed by this Court, because any elections held under what appellees call the

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[10] *Hampton County* is a much more recent case than *Georgia v. United States* and holds that elections must be set aside if the required federal approval is not forthcoming. 470 U.S. at 182-183.

"old system" would include those elements to which the Attorney General has objected. (Br. for Appellees at 49-50). However, the Louisiana legislature is free to adopt a new election plan in the districts at issue that deviates from the "old system" and cures the Section 5 objections, with elections to be held within any time limit imposed by this Court. In the absence of legislative action, the district court can consider in the first instance the feasibility of special elections within any time limit imposed by this Court. While such elections could not be held under what the appellees call the "old system" in the affected districts, federal courts have the authority to fashion *new* court-ordered election plans where necessary to insure compliance with Section 5. *Connor v. Waller*, 421 U.S. 656, 656-657 (1975); *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978) (opinion of White, J.). Whether special elections are held or not, this Court should impose a time limit by which the illegal judgeships expire so the long-standing Section 5 violations in this case will not continue unabated.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the district court's decision should be reversed.

Respectfully submitted,

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